88-526

Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

SHEARN MOODY, JR.,
Petitioner,

v.

EMPIRE LIFE INSURANCE COMPANY
AND JOHN S. GREENO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 1988

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QUESTION PRESENTED

Whether 28 U.S.C. section 1291 and Rule 54(b), F. R. Civ. P., precluded immediate review by the court of appeals of the district court's order granting partial summary judgment in Petitioner's bankruptcy adversary proceeding, even though the district court, without complying with Rule 54(b), purportedly rendered the order final and appealable by severing it from the remainder of the case.

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OPINION BELOW

The opinion of the Court of Appeals is reported, *Moody v. Empire Life Insurance Company (In re Moody)*, 849 F.2d 902 (5 Cir. 1988), and is reprinted with the judgment in the appendix at page 1a.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on June 28, 1988. This petition for certiorari was filed within 90 days thereafter. The Court has jurisdiction under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, section 1291:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .

Rule 21, F. R. Civ. P.:

Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 54, F. R. Civ. P.:

Judgments; Costs

(a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* Where more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties

only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 58, F. R. Civ. P.:

Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

STATEMENT OF THE CASE

Petitioner Shearn Moody, Jr. is the debtor in a Chapter 11 reorganization in the United States District Court for the Southern District of Texas, Houston Division. His bankruptcy filing was prompted by a substantial judgment for damages obtained against him by the statutory receiver of Respondent Empire Life Insurance Company of America, an Alabama corporation of which Moody was the principal shareholder and chief executive officer from 1963 until 1972, when an Alabama court placed the company into a receivership administered by the Alabama Commissioner of Insurance, Respondent John S. Greeno. See *Meyers v. Moody*, 475 F. Supp. 232 (N.D. Tex. 1979), *aff'd*, 693 F.2d 1196 (5 Cir. 1982), *cert. denied* 464 U.S. 920 (1983).

By the time Moody's bankruptcy petition was filed, the amount of the judgment against him, with accrued interest, had grown to $11,971,139.00. The Empire receiver filed a proof of claim in that amount. Moody then initiated an adversary proceeding (R. 3: 495, 595), in which he asserted a number of different grounds for disallowing the Empire receiver's claim and invalidating purported judgment liens filed by the receiver against property of the estate.

After the Empire receiver answered the adversary complaint (R. 3: 574), Moody promptly moved for summary judgment on his objection to the Empire claim (R. 3: 554). That motion was never decided. The Empire receiver then filed his own motion for partial summary judgment, affirmatively declaring in that motion that he was not seeking summary judgment "as to the validity of liens securing the Receiver's claim" (R. 1: 130, 132),

but was asking only for an interlocutory order allowing Empire's $11,971,139.00 claim.

Following the filing of a response by Moody (R. 1: 78), the district court entered an order entitled "Order Granting Partial Summary Judgment" (R. 1: 16), which allowed the Empire claim *in toto,* rejected Moody's objection to the claim, and found the prior judgment for damages and orders of the Alabama receivership court were conclusive and binding on the issue of allowability of the claim. The district court's order did not determine the validity of the alleged judgment liens arising from the Empire receiver's claim, did not expressly make the determination and direction required by Rule 54(b), F. R. Civ. P., and was neither denominated a "final judgment" nor accompanied by a separate judgment conforming with Rule 58, F. R. Civ. P.

The next day the trustee filed a motion to intervene in the adversary proceeding (R. 1: 12), contending in substance in his complaint in intervention that the recordation of an abstract of judgment by the Empire receiver three days prior to the commencement of Moody's bankruptcy proceeding constituted a preferential transfer under 11 U.S.C. section 547 (R. 1: 71). The motion to intervene was granted (R. 1: 11), and the trustee is now a party to the adversary proceeding out of which this petition for certiorari arises, although he is not a party in this court and was not a party in the court of appeals.

Several months later the Empire receiver filed a pleading entitled "Motion to Sever" (R. 1: 3), alleging in substance that, "the validity of the receiver's claim now having been determined, that portion of the adversary proceeding should be severed from Moody's attack on

the validity of judgment liens" (R. 1: 4). The district court thereupon entered an "Order Granting Severance" (R. 1: 6), purporting to sever that portion of the controversy associated with the allowance of the Empire receiver's claim from the remainder of the adversary proceeding but, again, unaccompanied by a Rule 54(b) certification or a Rule 58 separate judgment. Neither of the severed proceedings was assigned a separate case number. Uncertain whether the severance order rendered an otherwise unappealable interlocutory order "final" within the meaning of 28 U.S.C. section 1291, Moody initiated a timely protective appeal to the court of appeals, pointing out the potential jurisdictional problem in a motion filed in that court prior to briefing and oral argument.

The Fifth Circuit reached the merits of the controversy and affirmed the district court's order granting partial summary judgment, rejecting the suggestion that it lacked appellate jurisdiction because that order was not final. Without adverting to Rule 54(b), or its prescription that an order, "however designated," is not final and appealable in the absence of the express determination and direction demanded by the rule unless it decides all rights and liabilities of all parties, the court of appeals reasoned that "the allowance of the claim ended a discrete judicial unit in the bankruptcy case," 849 F.2d at 904, and that, as held by the First Circuit in *In re Saco Local Development Corp.*, 711 F.2d 441, 448 (1 Cir. 1983), every order allowing a claim or priority in bankruptcy is final and appealable so long as it "effectively settles the amount due the creditor."

REASONS FOR GRANTING THE WRIT

The significant question presented by this case is whether the finality requirement imposed by 28 U.S.C. section 1291, implementing the strong federal policy against piecemeal appeals explicitly recognized by Rule 54(b), F. R. Civ. P., may be effortlessly circumvented through the simple expedient of severing the issues decided by an otherwise unappealable interlocutory order from the remainder of the case. Certiorari should be granted to consider whether the decision below undermines the long-established principle that, in the absence of extraordinary circumstances, one case should generate no more than one appeal.

The Court has been understandably strict in its insistence on finality, interpreting narrowly the "collateral order" exception recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). "Immediate review of every trial court ruling, while permitting more prompt correction of erroneous decisions, would impose unreasonable disruption, delay, and expense." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985). As a consequence of these and related considerations, the Court's decisions repeatedly have stressed that the congressional policy embodied in section 1291 "is inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation. . . ." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982); *Van Cauwenberghe v. Biard*, 486 U.S.____, ____, 108 S. Ct. 1945, 1952, 100 L.Ed.2d 517, 528 (1988); *Flanagan v. United States*, 465 U.S. 259, 263-64 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-74 (1981).

It is beyond question that the order granting partial summary judgment in this case was not an appealable "collateral order" of the sort recognized in *Cohen* and *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). While the order did conclusively determine the allowability of the Empire claim, the issues implicated by that determination were not "completely separate from the merits of the action," and, most importantly, were not "effectively unreviewable on appeal from a final judgment." Since "a party seeking appeal must show that all three requirements are satisfied," *Stringfellow v. Concerned Neighbors in Action*, 480 U.S.____, ____, 107 S. Ct. 1177, 1182, 94 L.Ed.2d 389, 398 (1987), appellate jurisdiction in the court of appeals cannot have been derived from the *Cohens-Coopers & Lybrand* exception.

Nor could jurisdiction have been predicated on those cases holding that an order terminating a bankruptcy adversary proceeding, as a discrete "judicial unit" within the larger bankruptcy case, is final and appealable. See, e.g., *Smith v. Revie (In re Moody)*, 817 F.2d 365, 367 (5 Cir. 1987); *Country Management, Inc. v. Kriegel (In re Country Management, Inc.)*, 788 F.2d 311, 313 (5 Cir. 1986); *In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1 Cir. 1983). Even though such decisions "view finality for purposes of appellate jurisdiction more flexibly in the context of bankruptcy cases than in ordinary civil proceedings," they nonetheless recognize that "as a general rule finality for appeal purposes does not occur until the [district] court has settled all the issues pending between the parties in that [adversary] proceeding." *Smith v. Seaside Lanes (In re Moody)*, 825 F.2d 81, 85-86 (5 Cir. 1987); *Louisiana World Exposition, Inc. v. Federal Insurance*

Co. (In re Louisiana World Exposition, Inc.), 832 F.2d 1391, 1396 (5 Cir. 1987). Rather than terminating the adversary proceeding by deciding all claims raised and defenses asserted by all parties to that proceeding, the district court decided only the issues associated with the allowability of the Empire claim, leaving unresolved those issues associated with the purported judgment liens and the alleged preferential transfer they occasioned. Traditionally such orders, even in bankruptcy cases, have been deemed interlocutory and unappealable, since "the separate dispute being assessed must have been finally resolved and leave nothing more for the bankruptcy court to do." *Charter Co. v. Prudential Insurance Co. of America (In re Charter Co.)*, 778 F.2d 617, 621 (11 Cir. 1985); *Aetna Life Insurance Co. v. Leimer (In re Leimer)*, 724 F.2d 744, 745 (8 Cir. 1984).

Finally, Rule 21, F. R. Civ. P. cannot be construed to sanction an order of severance as a mechanism for rendering final and immediately appealable an otherwise interlocutory, non-appealable decision, although at least two Fifth Circuit decisions apparently come close to so holding. See *Sidag Aktiengesellschaft v. Smoked Foods Products Co., Inc.*, 813 F.2d 81, 84 (5 Cir. 1987) and *United States v. O'Neil*, 709 F.2d 361, 368-69 (5 Cir. 1983). Severance-created finality effectively undermines Rule 54(b) altogether and creates inevitable uncertainty when, as here, two assertedly separate and independent claims are nevertheless so interrelated that the disposition of one is contingent upon the other.

Thus, the process of allowing a claim and determining an objection to that claim based upon an alleged preferential transfer are inextricably interlinked, and objections

to the claim (on whatever grounds) cannot be finally resolved until the preference issue has first been resolved. This Court expressly so held in *Katchen v. Landy,* 382 U.S. 323, 330 (1966): "Unavoidably, and by the very terms of the [Bankruptcy] Act, when a bankruptcy trustee presents a [preferential transfer] objection to a claim, the claim can be neither allowed nor disallowed until the preference matter is adjudicated." Because the trustee's complaint in intervention was filed long before the order of severance, his claims respecting the alleged judgment liens should have been resolved before the entry of any purportedly "final" order allowing or disallowing the Empire receiver's claim.

Given the interrelated character of the legal and factual issues associated with Petitioner's objections to allowance of the Empire claim and the trustee's allegation of a preferential transfer, it is not at all clear that Rule 54(b) certification would have been appropriate even if Petitioner had sought it. What is clear, however, is that in the absence of certification under Rule 54(b) an order granting partial summary judgment is by its terms interlocutory and unappealable. *Chacon v. Babcock,* 640 F.2d 221, 222 (9 Cir. 1981). It does not lose that character simply because it is supposedly "severed" from the remainder of the case. Sanctioning such a result risks the very realistic possibility of wholesale evasion of the finality requirement and the strictures of Rule 54(b).

CONCLUSION

For the foregoing reasons, Petitioner Shearn Moody, Jr. asks that his petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

In re Shearn MOODY, Jr.

Shearn MOODY, Jr.,
Plaintiff-Appellant,

v.

EMPIRE LIFE INSURANCE COMPANY
and John S. Greeno,
Defendants-Appellees.

No. 87-2718.

United States Court of Appeals,
Fifth Circuit.

June 28, 1988.

Appeal from the United States District Court for the Southern District of Texas.

Before POLITZ and JOHNSON, Circuit Judges, and BOYLE,* District Judge.

POLITZ, Circuit Judge:

Shearn Moody, Jr. appeals the summary judgment allowance of the claim filed by the Alabama Receiver of Empire Life Insurance Company of America against the estate of Moody's Chapter 11 bankruptcy proceeding. Satisfied that we have jurisdiction, and that there is no merit in any contention raised on appeal, we affirm.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

BACKGROUND

In June of 1963 Moody incorporated Empire under the laws of the State of Alabama. He was majority stockholder, president, chief executive officer, and chairman of the board of directors from that time until June of 1972 when Empire was declared insolvent and placed in receivership by an Alabama circuit court.[1]

Shortly before the declaration of insolvency, David C. Meyers and other Empire shareholders filed derivative suits against Moody, alleging gross mismanagement, fraud, and securities law violations. After Empire was placed in receivership, the Receiver assumed control of the derivative actions. The Receiver alleged that Moody had violated his fiduciary duties, was guilty of gross mismanagement and fraud, and had violated Section 10(b) of the Securities Act of 1934. After trial by jury, in May of 1979 the court entered judgment against Moody for fraud and securities law violations. Actual damages of $5,319,000 and punitive damages of $1,000,000 were assessed. *Meyers v. Moody,* 475 F.Supp. 232 (N.D. Tex. 1979). We affirmed, *Meyers v. Moody,* 693 F.2d 1196 (5th Cir. 1982). The Supreme Court denied certiorari, *Moody v. Meyers,* 464 U.S. 920, 104 S. Ct. 287, 78 L.Ed.2d 264 (1983).

In June of 1974, during the pendency of the derivative actions, the Alabama court granted the Receiver an order of liquidation of Empire and approved a bulk reinsurance agreement with Protective Life Insurance Company (sometimes hereafter referred to as the "Treaty").

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1. Ancillary receiverships followed in Arkansas, Montana, and Texas.

Shortly after the Supreme Court denied certiorari, Moody filed a Chapter 13 bankruptcy petition in the Middle District of North Carolina. Moody's filing was later converted to a Chapter 11 proceeding, a trustee was appointed, and the case was transferred to the Southern District of Texas. The Receiver filed a proof-of-claim against the bankrupt estate for $11,971,139, representing the principal of the May 1979 judgment, together with accrued interest.

Moody responded to the Receiver's claims by filing a pleading entitled "Objection to Claim and Complaint to Determine the Validity of Judgment Liens," which objected to allowance of the claim of the Receiver, and sought to nullify the liens securing the *Meyers v. Moody* judgment.

The Receiver opposed Moody's complaint about the liens and moved for partial summary judgment, urging the court to allow its judgment claim. Action on the issue of the validity of the liens was not included in the motion for summary judgment. The Receiver supported its summary judgment motion with an affidavit and certified copies of documents. Moody filed an opposing memorandum with attachments, but offered no countervailing evidence as prescribed by Fed. R. Civ. P. 56.

The district court granted the motion for summary judgment and entered a judgment allowing the Receiver's claim in the amount requested. Moody appealed. The district court then granted the Receiver's unopposed motion to sever the issue resolved by the summary judgment from the issue relating to the validity of the judgment liens. Moody responded with his second notice of appeal, contending that: (1) this court lacks jurisdiction; (2)

the Receiver represents more than one creditor; (3) the Receiver is not the proper party to proscute the claim; (4) the district court erred in relying on a related decision by the Alabama court; and (5) the judgment is unconscionable and based on fraud.

ANALYSIS

1. *Jurisdiction*

Jurisdiction is always a threshold consideration for federal courts, for we are courts of limited jurisdiction. Despite the anomaly of Moody, as appellant, challenging appellate jurisdiction, we are prepared, *sua sponte* if necessary, to examine the bases for both federal and appellate jurisdiction. *Save the Bay, Inc. v. United States Army,* 639 F.2d 1100 (5th Cir. 1981); *Beers v. North American Van Lines, Inc.,* 836 F.2d 910 (5th Cir. 1988).

[1] Moody suggests that the allowance of the bankruptcy claim based on the *Meyers v. Moody* judgment, and the challenge to the validity of the judgment liens, are so closely intertwined that the issues must be jointly considered. We are not persuaded.

As we held in *Smith v. Revie (In re Moody),* 817 F.2d 365, 368 (5th Cir. 1987), "a bankruptcy proceeding is over when an order has been entered that ends a discrete judicial unit in the larger case." And we agree in principle with our First Circuit collegues who have concluded that "as long as an order allowing a claim or priority [in a bankruptcy proceeding] effectively settles the amount due the creditor, the order is 'final.'" *In re Saco Local Development Corp.,* 711 F.2d 441, 448 (1st Cir. 1983). We need not speak that embracively, and do not. But in the case before us, considering that the allowance of

the claim ended a discrete judicial unit in the bankruptcy case, and that the court specifically severed that claim, from the related lien-validity dispute, the judgment appealed is a final judgment under 28 U.S.C. § 1291.

2. *Representation of multiple creditors*

[2] We decline to consider the contention that the Receiver represents more than one creditor. That issue was not presented to the trial court. As a general proposition, we will not consider issues not presented to the district court. *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868, 49 L.Ed.2d 826 (1976); *United States v. Grapp*, 653 F.2d 189 (5th Cir. 1981). None of the exceptions to the general proposition are applicable herein.

3. *Receiver not proper party*

[3] Moody does not challenge the authority of the Receiver to file a proof-of-claim as the statutory representative of those on whose behalf he originally recovered judgment in *Meyers v. Moody*. He bases his argument that the Receiver is not the real party at interest on the contention that the Receiver has unconditionally transferred his interest in the judgment, primarily to Protective. Accordingly, Moody suggests, the requirements of Bankruptcy Rule 3001(e)(1) are not met.

The record is devoid of evidence establishing an unconditional transfer of the interest in the *Meyers v. Moody* judgment to any person. The only evidence which we may consider relates to the bulk reinsurance agreement with Protective. Moody maintains that all or a portion of the judgment was transferred to Protective by that agreement. That agreement, denominated The

Treaty of Assumption and Bulk Reinsurance, contains specific language to the contrary. It provides:

> . . . the Receiver shall not transfer to Protective any rights of action on behalf of Empire against its former officers, directors, agents, and parties acting in concert with them, for fraud, deceit, mismanagement or other misconduct, but rather shall retain the same and shall prosecute any such right of action, including, without limitation, any and all claims made on behalf of Empire in the consolidated actions of Meyers, Haines and Bookout v. Moody, et al., presently pending in the United States District Court for the Northern District of Texas (CA Nos. 3-5678 and 3-7625-D).

Further, in a subsequent amendment to the Treaty, the parties agreed that "after payment to Protective of the Policyholder Amount, . . . the Receiver may retain any excess, and . . . a pro rata adjustment of the amount to be paid to Protective may be made . . . to prevent unlawful discrimination against non-policy holder creditors." The agreement reserves to the Receiver any excess over the defined Policyholder Amount, and permits adjustment of the amount which Protective is to receive. Although Protective has been assigned what ultimately may be all of the proceeds of the judgment, this contract, as amended, does not unconditionally transfer the Recevier's interest in the judgment. As recognized by the Alabama state court, and the court *a quo,* Protective has nothing more than a priority over a stated amount of the funds recovered in satisfaction of the judgment. Indeed, the Alabama receivership court, obviously conversant with controlling Alabama law, specifically ruled that Protective had not been assigned the Receiver's

interest in the judgment. Moody's contention to the contrary is not persuasive.

4. *Undue reliance on Alabama court*

Moody suggests that the district court abdicated its obligation to review independently the Receiver's claim, but accepted as conclusive the decision of the Alabama receivership court which reviewed the Treaty. The record belies this contention, for it reflects that the district court referred to the Treaty and to bankruptcy rubrics, to support its essential rulings on the motion for summary judgment. That the district court reached the same conclusion as the Alabama court constitutes a condemnation of neither court. Rather, the unanimity increases the likelihood that a correct result was reached. Further, such a reliance by the district court would not have been either inappropriate or misplaced. Prior to the transfer of this matter to the Southern District of Texas, the district court for the Northern District of Alabama ruled that the receivership was an *in rem* or *quasi in rem* proceeding, and, as a result thereof, the Alabama receivership court had exclusive jurisdiction to determine the rights of the creditors and shareholders to Empire's assets. *In re Moody,* Civ. No. 83-4-2579-S & 83-HM-2999-S (Memorandum Op., N.D. Ala., Feb. 17, 1984). If it were not required that the district court defer to the Alabama court's analysis of Alabama law in ruling on the motion for summary judgment, it cannot be gainsaid that it was entirely appropriate for the district court to be conscious of the Alabama court's ruling and to seek to harmonize its ruling therewith. This assignment of error is without merit.

5. *Judgment is unconscionable and is based on fraud*

[4] Moody's final contention would reopen *Meyers v. Moody*. This we decline to do. A federal court exercising bankruptcy jurisdiction has considerable equitable powers. This does not include the power to set aside money judgments which have become final, other than on the grounds provided by Fed. R. Civ. P. 60. Moody complains that because of the Treaty, Protective and another person will receive a windfall, and this circumstance, apparent only since entry of the judgment, is a sufficient basis for voiding the *Meyers v. Moody* judgment. We do not agree. *See Kirksey v. City of Jackson,* 714 F.2d 42 (5th Cir. 1983); *Cook v. Birmingham News,* 618 F.2d 1149 (5th Cir. 1980).

Typically, a judgment may be changed if continued enforcement would be inequitable only if the judgment operates prospectively. A judgment operates prospectively if it requires a court to supervise changing conduct or conditions that are provisional or tentative. *Cook,* 618 F.2d at 1152-53 (*citing United States v. Swift & Co.,* 286 U.S. 106, 114, 52 S. Ct. 460, 462, 76 L.Ed. 999 (1932)). That is not the situation in the case at bar.

[5] Finally, Moody seeks the avoidance of the *Meyers v. Moody* judgment because, he claims, it was obtained by fraud. This claim was not presented to the trial court; it is first raised on appeal. Besides the rule discussed at point of error number 2, that issues may not be first raised on appeal, this contention runs afoul of Fed. R. Civ. P. 9(b), which requires that claims of fraud are to be pled, and obviously thereafter proven, with particularity. Arguments in brief fall far short of that mark.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-2718

D.C. Docket No. CA-86-2320

IN RE: SHEARN MOODY, JR.

SHEARN MOODY, JR.,
Plaintiff-Appellant,

v.

EMPIRE LIFE INSURANCE COMPANY
and MICHAEL DEBELLIS,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

Before POLITZ and JOHNSON, Circuit Judges, and BOYLE,* District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

June 28, 1988

ISSUED AS MANDATE: JULY 20, 1988

Supreme Court, U.S.
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(2)

No. 88-526

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October Term, 1988

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EMPIRE LIFE INSURANCE COMPANY
AND JOHN S. GREENO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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12 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether review by the Court of Appeals was proper under 28 U.S.C. 1291 following an order of severance by the District Court under Fed. R. Civ. P. Rule 21 which left all issues in the action resolved.

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No. 88-526

In The

Supreme Court of the United States

October Term, 1988

SHEARN MOODY, JR.,

Petitioner,

vs.

EMPIRE LIFE INSURANCE COMPANY
AND JOHN S. GREENO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 849 F.2d 902 and is attached to Petitioner's appendix at page 1a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition").

STATUTES AND RULES OF PROCEDURE INVOLVED

28 U.S.C. 1291 provides in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Fed. R. Civ. P. 21 provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Fed. R. Civ. P. 54(b) provides in pertinent part:

> Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and

direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Sup. Ct. R. 17 provides in pertinent part:

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

COUNTERSTATEMENT OF THE CASE

Petitioner Shearn Moody, Jr. ("Petitioner" or "Moody") is the Debtor in a Chapter 11 bankruptcy reorganization case pending in the United States District Court for the Southern District of Texas, Houston Division. Moody formed Empire Life Insurance Company of America ("Empire") in June, 1963 under Alabama law. Moody was the majority shareholder as well as the President and Chairman of the Board from Empire's inception until Empire was declared insolvent and placed in receivership by order of the Circuit Court of Jefferson County, Alabama in 1972.

The Receiver for Empire (the "Receiver")[1] filed a Proof of Claim in the Moody bankruptcy case based upon a judgment entered against Moody in favor of the Receiver in a prior action, *Meyers v. Moody*, 475 F.Supp. 323 (N.D. Tex. 1979), *aff'd*. 693 F.2d 1196 (5th Cir. 1982), *cert. denied* 464 U.S. 920 (1983). Moody instituted an adversary proceeding in connection with his pending bankruptcy case (i) objecting to the Receiver's claim and (ii) seeking to set aside judgment liens securing the Receiver's claim.

The Receiver obtained partial summary judgment allowing its claim in the adversary proceeding on February 18, 1987 pursuant to an Order Granting Partial Summary Judgment (the "Summary Judgment Order"). Thereafter, *with Moody's consent*, the District Court severed the issue of the validity of the Receiver's claim from the remaining undetermined issues as to the validity of judgment liens securing the Receiver's claim. The severance was made at the request of the Receiver for the specific purpose of allowing the determination of the validity of the Receiver's claim to become a final judgment immediately appealable.

Following the entry of the severance order, Moody filed an appeal to the Fifth Circuit Court of Appeals ("Fifth Circuit") challenging the grant of summary judgment. Later, during the course of the appeal to the Fifth

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[1] John S. Greeno is nominally a party to this action as he was the receiver of Empire at the time of the District Court's judgment. The term "Receiver" is used without distinguishing between successive receivers for Empire including the current receiver, Mr. Nelson Burnett.

Circuit, Moody raised a jurisdictional issue claiming that the severance order did not render the Summary Judgment Order a final order within the meaning of 28 U.S.C. 1291.

The Fifth Circuit reached the merits of the controversy, affirming the District Court's judgment. The Fifth Circuit rejected Moody's argument that the allowance of the Receiver's claim and the challenge to the validity of the judgment liens were so closely intertwined that the issues had to be jointly considered. The Fifth Circuit stated that Moody's argument failed to recognize its prior holding in the case *Smith v. Revie (In re Moody)*, 817 F.2d 365, 368 (5th Cir. 1987). In that case the Fifth Circuit held that "a bankruptcy proceeding is over when an order has been entered that ends a discrete judicial unit in the larger case." Further, the Fifth Circuit agreed with the First Circuit in holding that "as long as an order allowing a claim or priority [in a bankruptcy proceeding] effectively settles the amount due the creditor, the order is 'final'." *In re Saco Local Development Corp.*, 711 F.2d 441, 448 (1st Cir. 1983).

REASONS FOR DENYING THE WRIT

The Petition sought by Moody should be denied on two specific grounds. One is that no important ground for granting certiorari exists, and the second is that the Fifth Circuit correctly decided this case on the merits.

Supreme Court Rule of Procedure Rule 17 notes that review by writ of certiorari is not a matter of right, but of judicial discretion. Therefore, certiorari is only granted in

cases where there are special and important reasons for Supreme Court review. Special and important reasons "imply a reach to a problem beyond the academic or the episodic", *Rice v. Sioux City Memorial Hospital Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Further, certiorari should not be granted "except in cases involving principals the settlement of which is of importance to the public, as distinguished from that of the parties. . . ." *Id.* at 79.

The Petition filed by Moody presents no important issue of federal law. In addition, no conflict between federal courts, state courts, or prior decisions of the Supreme Court is in question here. The only problem that Moody envisions in his argument for certiorari is that severance of separate claims which renders a resolved claim immediately appealable creates a possibilty of "evasion of the finality requirement and the strictures of [Federal Rule of Civil Procedure] Rule 54(b)." (Petition, p. 10). The Petition does not state that the evasion of Rule 54(b) it envisions has ever occurred, much less that it is occurring with any dangerous frequency. Furthermore, Petitioner does not even explain why such an evasion would merit concern. In fact, Moody seems to argue that the District Court certainly could have made immediate appeal proper by making a certification under Rule 54(b) but failed to follow the proper procedure. If the same result could have been obtained by a different procedure, then this case can hardly constitute an infringement of a basic federal interest. At best, the issue raised by Petitioner is purely episodic and important only to the litigants involved. Thus, Supreme Court review is unwarranted.

Nor is the decision of the Fifth Circuit herein in conflict with decisions of this Court or decisions of other circuit courts. The basic thrust of Petitioner's argument is that the allowance of the Receiver's claim was not appealable under 28 U.S.C. 1291 because it was not "final". Moody admits that prior decisions of the Fifth Circuit determine "finality for purposes of appellate jurisdiction more flexibly in the context of bankruptcy cases than in ordinary civil proceedings", *Smith v. Seaside Lanes (In re Moody)*, 825 F.2d 81, 85-86 (5th Cir. 1987) (Petition, p. 8). The current and prior decisions of the Fifth Circuit are consistent with decisions of at least one other circuit court. "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case* – and in particular, it is long provided that orders finally settling creditors' claims are separately appealable". *In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (emphasis in original).

Additionally, Petitioner misreads the purpose of Rule 54(b) and misapplies Rule 54(b) and the finality test to the underlying facts here. Petitioner repeatedly states that the District Court failed to certify the Receiver's claim under Rule 54(b) as an interlocutory order which was appealable. Following the severance, the only issue in the adversary proceeding was the allowability of the Receiver's claim. That issue having been decided, no issue remained for the Court to pass upon. Rule 54(b) holds, in salient part, "*Where more than one claim for relief is presented in an action*, the Court may direct the entry of final judgment as to one or more but fewer than all of the claims of parties only upon an expressed determination

that there is no just reason for delay and upon an expressed direction for the entry of the judgment." (emphasis added). Clearly, Rule 54(b) requires certification only if more than one claim for relief is presented in an action. But that indisputably is not the case here.

The District Court has authority pursuant to Federal Rules of Civil Procedure Rule 21 to sever any claim and proceed with it separately. The order severing the Receiver's claim, which allowed it to continue as a separate matter, was proper, leaving only one claim for relief involved in the adversary proceeding appealed from by Moody. As all issues in that adversary proceeding had been resolved, Rule 54(b) was inapplicable and the Receiver's claim was appealable as final under 28 U.S.C. 1291. Petitioner's belabored misunderstanding of this simple, straightforward procedure is as unfathomable as his contrived fear of a "wholesale evasion" of Rule 54(b).

Therefore, as no special or important issue affecting the public is raised by the Petition and the Fifth Circuit's decision is correct, the Petition should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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